IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Mt. Lake Pools, Inc. d/b/a Mt. Lake Pool & Patio, Petitioner	:	
v.	:	No. 307 C.D. 2011
	:	Submitted: July 8, 2011
Unemployment Compensation Board of Review, Respondent	:	

BEFORE: HONORABLE DAN PELLEGRINI, Judge
HONORABLE MARY HANNAH LEAVITT, Judge
HONORABLE JOHNNY J. BUTLER, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE PELLEGRINI FILED: August 3, 2011

Mt. Lake Pools, Inc. d/b/a Mt. Lake Pool & Patio (Employer) petitions for review from an order of the Unemployment Compensation Board of Review (Board) reversing the decision of the Referee and granting unemployment compensation benefits to Troy Tomczak (Claimant) because he was not guilty of theft and, therefore, not guilty of willful misconduct under Section 402(e) of the Unemployment Compensation Law (Law).[1]

[1] Act of December 5, 1936, Second Ex. Sess., P.L. (1937), 2897, *as amended*, 43 P.S. §802. That section provides, in relevant part:

> An employe shall be ineligible for compensation for any week –

(Footnote continued on next page…)

Claimant was employed by Employer as a full-time warehouse manager for 12 years. Employer's merchandise included pool and patio furniture. Claimant believed he had permission from Mrs. Arlene Stachel (Mrs. Stachel), one of the co-owners, to take the damaged merchandise for his own use. Claimant used some of the damaged products in his own home, gave some of the damaged products to his friends and co-workers, and took some of the damaged products to a scrap yard for cash. When Michael Stachel, Jr. (Mr. Stachel), the other co-owner and son of Mrs. Stachel, discovered that Claimant had sold some of the damaged merchandise for scrap and kept the money for himself, he terminated Claimant's employment on August 16, 2010, alleging that Claimant lied and stole from Employer.

Claimant applied for unemployment compensation benefits, and the Unemployment Compensation Service Center (Service Center) granted Claimant benefits because Claimant had not admitted to the incident which caused the separation and Employer did not provide information to show that Claimant was

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(continued…)

> (e) in which his unemployment is due to his discharge or temporary suspension from work for willful misconduct connected with his work, irrespective of whether or not such work is "employment" as defined in this act.

Willful misconduct has been defined as (1) the wanton and willful disregard of the employer's interest; (2) the deliberate violation of rules; (3) the disregard of standards of behavior which an employer can rightfully expect from his employee; or (4) negligence which manifests culpability, wrongful intent, evil design or intentional and substantial disregard for the employer's interests or the employee's duties and obligations. *Sheetz, Inc. v. Unemployment Compensation Board of Review*, 578 A.2d 621 (Pa. Cmwlth. 1990).

involved in the incident that caused the separation. Employer appealed, and a hearing was held before a Referee at which only Employer, represented by counsel, and one witness appeared.

Mr. Stachel testified that Claimant's position was head delivery person and warehouse manager and his duties included inventory, keeping the warehouse clean, and scheduling himself and other delivery personnel for furniture deliveries. He was in a position of trust regarding the inventory for the warehouse. Inventory consisted of furniture, swimming pool equipment, trucks, pipes, fittings, cushions, billiard tables and stock for the warehouse. He stated that the incident which caused Claimant to be terminated was that Claimant had told him that one of their delivery trucks was on a delivery and then on an errand for Claimant picking up a prescription from Claimant's dentist, but Mr. Stachel thought that the location was far away and knew that Claimant's personal vehicle was sitting in the parking lot. Mr. Stachel decided to drive down to where the delivery truck was located based on the GPS system in the truck, and it turned out to be Sullivan Scrap Yards. He met with Mr. Whalen, the owner of the scrap yard, who proceeded to show him his delivery truck and Employer's furniture. He also showed him the receipt he gave the delivery man for the furniture. Mr. Stachel stated that when he asked Mr. Whalen about Claimant, Mr. Whalen showed him previous receipts he had given Claimant and a copy of Claimant's license. Mr. Whalen told him that Claimant had been there three other times earlier in the year and collected money for the same type of furniture. When Mr. Stachel went back to his office, he met with Claimant who told him he had only been to Sullivan Scrap Yards once. When confronted with the other receipts and the fact that other furniture had been

missing, Claimant said "he's sorry he lied, he did take it down and cash it in and that's when I fired him." (October 25, 2010 Hearing at 7.) Mr. Stachel stated that he did not let his employees take furniture. "Anything that we have that's scratched, damaged, we keep for extra parts or if we can sell it, we will sell it at discount at a warehouse sale that we have every year." *Id*. At no time did he ever tell him that he could sell the furniture for personal profit. Mr. Stachel offered into evidence a copy of the GPS report showing the location of his delivery truck at Sullivan Scrap Yards. Mr. Whalen also testified verifying that he was the owner of Sullivan Scrap Yards and that Claimant had brought scrap metal to his shop on three different occasions.

The Referee found that Claimant had made inconsistent statements to Employer about the delivery initially telling Mr. Stachel that the delivery truck was on a delivery and then the delivery person was picking up a prescription. Employer confronted Claimant who admitted that he had sold Employer's furniture and metal objects for scrap metal. Based on those findings, the Referee denied benefits because Employer had provided credible testimony that Claimant took Employer's property and sold it for his own gain without authorization. "Theft, as a matter of law, is willful misconduct." (Referee's October 26, 2010 Decision at 2.)

Claimant appealed to the Board stating that he never received notice of the hearing and that he wanted to present his side of the situation. The Board issued a decision and order remanding the matter to the Referee to hold another hearing acting as hearing officer for the Board to receive testimony on Claimant's

reason for his non-appearance at the first hearing and to take testimony on the merits if Claimant established good cause for his non-appearance.

At the second hearing before the Referee, Claimant appeared and was represented by counsel as did Employer. Claimant testified that he did not attend the first hearing because he had not received the hearing notice. He explained that his mail was delivered up the street from his house and there were 85 mailboxes at one location. "I frequently get other people's mail so I don't know if that is what happened, but I did not receive it." (January 1, 2011 Hearing at 5.) He also indicated that other people had brought him his mail that was intended for him that they had received mistakenly. As for the willful misconduct charge, he denied lying and stealing. Claimant stated that he had been given many items that he had in his possession by his supervisor, Mrs. Stachel, and if he took them to the scrap yard, it was because they were going to be thrown in the trash. Claimant pointed out that Mr. Stachel was not his immediate supervisor and would have no recollection of what he was and was not given in terms of furniture. Claimant also denied telling Mr. Stachel that the delivery person was out picking up a dental prescription for him.

Mr. Stachel testified that he regularly communicated with his mother regarding the business, and he never heard anything from her about authorizing Claimant to dispose of furniture and sell it for his profit. Mr. Stachel offered into evidence an affidavit from Mrs. Stachel stating that at no time did she authorize or direct Claimant to dispose of any furniture owned by Mt. Lake Pools selling it for his own personal gain.

The Board found Claimant credible regarding his reason for not attending the first hearing, specifically noting that Claimant's mailbox was located in a central mailbox area with 85 other mailboxes and mail was frequently misplaced. It concluded that Claimant had established good cause for not appearing at the first hearing. On the issue of Claimant's termination for willful misconduct, the Board resolved the conflict between Claimant's testimony and that of Mr. Stachel in favor of Claimant when he stated that he had permission from Mrs. Stachel to take the damaged scrap products, dispose of them as he saw fit, and he had been doing so for years. The Board determined that what Claimant did with the products thereafter was his business and was not theft. Because Employer failed to carry its burden of proving willful misconduct, Claimant was eligible for benefits under Section 402(e) of the Law. This appeal by Employer followed.[2]

Employer contends that the Board erred when it simply accepted Claimant's testimony that he did not receive the first notice of hearing in violation of the well-established mailbox rule that when a properly mailed notice of a hearing was sent to Claimant's last known address, it was presumed that the notice was received.

Where a party fails to appear at a scheduled hearing, the Board may remand the case for an additional hearing so that the Board may determine whether

[2] Our scope of review is limited to determining whether constitutional rights were violated, an error of law was committed or findings of fact were not supported by substantial evidence. *Glenn v. Unemployment Compensation Board of Review,* 928 A.2d 1169 (Pa. Cmwlth. 2007).

the reasons for the party's failure to appear constitute "proper cause." *McNeill v. Unemployment Compensation Board of Review*, 510 Pa. 574, 511 A.2d 167 (1986).[3] At the remand hearing, testimony regarding the non-receipt of the hearing notice, i.e., proof as to whether the hearing notice was mailed, raises the rebuttable presumption that the mailed notice was, in fact, received. *Dow v. Workers' Compensation Appeal Board (Household Finance Company)*, 768 A.2d 1221 (Pa. Cmwlth. 2001). A mere denial of the receipt of the mailed notice is not enough to rebut the presumption. *Id*. The credibility of the claimant's testimony on the subject and the weight to be given the evidence presented are matters to be decided

[3] The Board's regulations at 34 Pa. Code §§101.24 (a) & (c) provide the following procedure by which an additional hearing may be allowed:

> 101.24.
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> (a) Requests for reopening, whether made to the referee or the Board, shall be in writing; shall give the reasons believed to constitute "proper cause" for not appearing; and they shall be delivered or mailed…to the local employment office where the appeal was filed.
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> * * *
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> (c) A request for reopening the hearing which is not received before the decision was mailed, but is received or postmarked on or before the 15th day after the decision of the referee was mailed to the parties shall constitute a request for further appeal to the Board and a reopening of the hearing, and the Board will rule upon the request. If the request for reopening is allowed, the case will be remanded and a new hearing scheduled, with written notice thereof to each of the parties. At a reopened hearing, the opposing party shall be given the opportunity to object to the reopening if he so desires.

by the Board. *Gaskins v. Unemployment Compensation Board of Review*, 429 A.2d 138 (Pa. Cmwlth. 1981).

Claimant sent a request to the Board indicating that he did not receive notice of the first hearing, and the Board remanded for a second hearing. At the second hearing before the Referee, Claimant testified that his mailbox was located up the street from him and was just one of 85 mailboxes. He did not always receive his mail as evidenced by a neighbor bringing his mail to him. The Board found him credible that mail was frequently misplaced. Because the Board is the ultimate factfinder and determine of credibility, *McCarthy v. Unemployment Compensation Board of Review*, 829 A.2d 1266 (Pa. Cmwlth. 2003), we will not disturb the Board's determination.

Employer also argues that the Board resolved the significant conflict in the testimony between Claimant and Mr. Stachel, the co-owner, in favor of Claimant without any explanation or reason, and the only evidence was Claimant's own self-serving testimony. Employer explains that it offered the testimony of Mr. Stachel and an affidavit by Mrs. Stachel stating that she never told Claimant that he could take the furniture and sell it for scrap. However, the Board stated that it resolved the conflict in favor of Claimant, and pursuant to our holding in *M.A. Bruder & Sons, Inc. v. Unemployment Compensation Board of Review*, 603 A.2d 271 (Pa. Cmwlth. 1992), a finding where the Board chooses to believe one party over another is sufficient reasoning by the Board. Employer further argues that Claimant was also fired for lying about taking the furniture but the Board only considered the theft argument. Because the Board did not consider the second

reason for his termination, Employer argues that its decision should be reversed. However, subsumed in its credibility determination was its consideration of that issue as well. Because the Board did not find Mr. Stachel credible regarding the issue of theft, it did not find him credible regarding the issue of lying.

Employer argues next that its due process rights under the United States and Pennsylvania Constitutions were violated when the Board remanded the second hearing to a Referee to hear live testimony; yet the Board made the ultimate credibility determinations without actually hearing the live testimony. "[T]he Review Board asked the Referee to hold a hearing and make evidentiary rulings, but the ultimate decision-maker is an unknown faceless entity hidden behind the curtain like the Wizard of Oz. Due process demands otherwise, for a proper appreciation of live testimony is that the finder of fact must be able to evaluate not only the words spoken but the demeanor of the witnesses and the context in which testimony is presented – all of which requires that the finder of fact be present for testimony." (Employer's Brief at 22.)

However, this argument has been made before and our Supreme Court has disagreed with Employer, commenting as follows:

> [A]ppellant's proposition that the referee should have the exclusive power to resolve credibility issues is based on the notion that credibility evaluations depend on the observation of live witnesses while they testify. Such observation is often important, but is not the only factor to be considered in deciding who is to evaluate credibility on conflicting evidence. Considerations of expertise, uniformity of decision and control over policy are also relevant. Besides, a rule embodying that proposition

> would preclude a fact finder from weighing depositions against live evidence, or documents or exhibits against live testimony, a practice common and necessary to administrative and judicial fact-finding. We decline to adopt such a rule.

Peak v. Unemployment Compensation Board of Review, 509 Pa. 267, 279, 501 A.2d 1838, 1389-1390 (1985). Additionally, this Court has held that "[a]n adjudicative method where the ultimate decision in a case is made by an administrative fact finder who did not hear the testimony does not deny a litigant due process of law." *Cavanaugh v. Fayette County Zoning Hearing Board*, 700 A.2d 1353, 1356 (Pa. Cmwlth. 1997). Consequently, there have been no due process violations, and Employer's argument is without merit.

Accordingly, the order of the Board is affirmed.

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DAN PELLEGRINI, JUDGE

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O R D E R

AND NOW, this 3rd day of August, 2011, the order of the Unemployment Compensation Board of Review, dated February 14, 2011, at No. B-513302, is affirmed.

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DAN PELLEGRINI, JUDGE